



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-76-341

THE STATE OF CALIFORNIA, acting by and
through the DEPARTMENT OF WATER
RESOURCES,

Petitioner,

v.

THE OROVILLE-WYANDOTTE IRRIGATION
DISTRICT, an irrigation district,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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No. 76-----

THE STATE OF CALIFORNIA, acting by and
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DISTRICT, an irrigation district,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petitioner, State of California, acting by and through the Department of Water Resources, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this declaratory relief action on June 3, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A to this petition, and is reported in 536 F.2d 304 (Ninth Cir.

1976). The opinion of the United States District Court for the Eastern District of California, which opinion is affirmed and expressly adopted in the opinion of the Ninth Circuit, appears in Appendix B, and is reported in 411 Fed.Supp. 361 (E.D.Cal. 1975).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 3, 1976. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Decision 82561 of the California Public Utilities Commission issued March 12, 1974, re Application No. 48869 conflict with the Order of the Federal Power Commission issued January 17, 1974, re Projects 2088 and 2100?

2. If a conflict does exist between the decision and order referred to in Issue No. 1, does the Federal Power Act preempt California Water Code sections 11590-11592 in this situation?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, article I, section 8, clause 3, in relevant part:

"[The Congress shall have the power] To regulate commerce . . . among the several States"

FEDERAL STATUTORY PROVISIONS INVOLVED

Section 10 of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. Sections 803(a), 803(b) and 803(e):

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

"(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmis-

sion of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Section 317 of the Federal Power Act, 49 Stat. 862 (1935), 16 U.S.C. Section 825(p):

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder. Any criminal proceedings shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be

served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs., 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this Act."

CALIFORNIA STATUTORY PROVISIONS INVOLVED

Water Code section 11590:

"The department [Department of Water Resources] has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the department has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the department and the common carrier, public utility, or state agency."

Water Code section 11591:

"The expense of the department [Department of Water Resources] in complying with the requirements of this article is part of the cost of constructing the project."

Water Code section 11592:

"In the event the department [Department of Water Resources] and any common carrier railroad, other public utility, or state agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning requirements imposed by this chapter shall be submitted to and determined and decided by the Public Utilities Commission of the State."

STATEMENT OF THE CASE

In 1957 the Federal Power Commission (hereafter FPC) in the matter of FPC Project 2100 authorized the State of California's Department of Water Resources.(hereafter DWR) to construct in accordance with previously approved plans a dam, reservoir and power plant on the Feather River near Oroville, California. Three years later the FPC in the matter of FPC Project 2088 authorized the Oroville-Wyandotte Irrigation District (hereafter OWID) to modify previously approved plans for its Project 2088 to permit construction of an approximate 7 mile long canal, the Miners Ranch Canal, above and parallel to a portion of DWR's reservoir. The canal would supply most of its water to a downstream power plant.

Both OWID's canal and DWR's reservoir occupy lands withdrawn by the United States for power purposes pursuant to the Federal Power Act, 16 U.S.C. § 818.

Because the Miners Ranch Canal feature of OWID's Project 2088 was smaller in size than the reservoir, dam and power features of DWR's Project 2100, the canal was completed before the reservoir was completed and filled.

It is undisputed that during the construction of Miners Ranch Canal OWID deviated from the plans approved by the FPC by 1) constructing the lower reach of the canal closer to the planned water surface elevation of Oroville Reservoir, 2) constructing a maintenance road on the reservoir side of the canal rather than on the uphill side, 3) constructing communication lines within the reservoir area itself, and 4) constructing two large siphons in a manner that would not permit them to operate once DWR's reservoir was filled.

Operation of the Miners Ranch Canal commenced in 1963. On October 14, 1966, when DWR was in the later stages of construction of Project 2100, OWID filed an application (Application No. 48869) with the California Public Utilities Commission (hereafter CPUC) alleging that DWR's reservoir when completed and filled would "take or destroy" OWID's Miners Ranch Canal. OWID requested CPUC to order DWR to replace the entire canal with a suitable replacement facility. OWID invoked the jurisdiction of CPUC pursuant to California Water Code sections 11590 to 11592, which provide in pertinent part:

"11590—The department [Department of Water Resources] has no power to take or destroy the whole or any part of the line or plant of any . . . state agency, or the appurtenances thereof, either in the construction of any dam, canal . . . unless and until the department has provided for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness . . ."

"11592—In the event the department [Department of Water Resources] and any . . . state agency fail to agree as to the character or location of the new facilities . . . the character and location shall be submitted to and determined and decided by the Public Utilities Commission of the State."

As there were no allegations in OWID's application, nor have there been any in this entire dispute, that DWR was constructing its reservoir in any manner other than that previously approved by the FPC, DWR invoked the jurisdiction of the FPC to determine whether OWID's contentions were correct, what was the cause of any physical conflict between the Miners Ranch Canal and Oroville Reservoir, and who had responsibility under the Federal Power Act to rectify any conflict between these two power projects.

In May of 1967 the FPC issued an order which reads in part:

"This order directs a hearing involving two projects licensed by this Commission, Project No. 2088

(South Fork Project) and Project No. 2100 (Oroville Project). The matter is occasioned by an application of the licensee for Project No. 2088 for approval of 'as built' project facility drawings. Questions at issue are whether Project No. 2088 as built can be operated and maintained consistent with Project No. 2100 as licensed. If not, what actions should be taken by the Commission at this time regarding Project No. 2088 and Project No. 2100." (C.R., p. 349)

As a result of OWID's application before CPUC and the FPC's order of May 1967, separate administrative proceedings were conducted by both administrative bodies. The issue before the California Public Utilities Commission was whether Oroville Reservoir would take or destroy Miners Ranch Canal and, if so, what should be the replacement facility. At the outset of the hearing in 1967 before CPUC, DWR reserved its right to an adjudication of its federal law claims before the appropriate federal regulatory and judicial bodies (C.R., p. 536). After first finding that DWR's Oroville Reservoir would take or destroy Miners Ranch Canal, and ordering DWR to construct a pumping plant to replace it, CPUC ultimately amended its previous order and ordered DRW to *finance* the construction of a tunnel and other work which the FPC, as a result of the hearing before it in the matter of Projects 2100 and 2088, had ordered OWID to construct.

CPUC's Decision No. 82561, dated March 12, 1974 provides in pertinent part (C.R., pp. 393-394):

"IT IS ORDERED that:

"1. Finding 1 of Decision 79724 is amended as follows:

"The Department of Water Resources should be financially responsible for:

- "(a) Replacing the lower reach of Miners Ranch Canal with a tunnel approximately 4,400 feet in length extending from the vicinity of the intake tunnel upstream to near the lower siphon, and replacing the lower reach of the canal.
- "(b) Providing an improved all-weather roadway along the remaining length of the canal.
- "(c) Providing slope protection below the remaining length of the canal to include an adequate mantle of coarse material."

With respect to OWID's departure from its FPC approved plans in construction of Miners Ranch Canal, CPUC stated as a Conclusion of Law (Decision 745423; C.R., p. 363):

"The fact Miners Ranch Canal may have been constructed too far downhill at certain points is immaterial in this proceeding."

DWR sought review of CPUC's decision from the California Supreme Court. The California Supreme Court declined without comment to review the decision. Because OWID and CPUC opposed DWR's application for review by the California Supreme

Court on the ground, among others, of timeliness, DWR requested clarification of the Supreme Court's denial, which request was also denied.

In an initial decision issued March 11, 1968 (C.R., pp. 411-457) as a result of the hearing by the FPC on Projects 2100 and 2088, the FPC's Presiding Examiner found that OWID failed during the construction of Miners Ranch Canal to fulfill its responsibility to design and construct the canal in a manner to operate compatibly with DWR's previously licensed Project 2100, and directed OWID to submit plans for modification of the canal. As a result of a hearing before the full commission on OWID's exceptions to the examiner's initial decision, the FPC ordered that a three man consulting board be established to comment on the plans submitted by OWID. The order also provided in part (C.R., p. 460):

"At oral argument OWID requested that we hold in abeyance any decision as to the MR Canal, and that we order OWID to file revised plans in this connection within 120 days. Without hereby expressing any opinion on the merits of the controversy, we feel it appropriate to grant OWID further time to file revised plans so that we may have before us its position as to the appropriate changes to be made in the project. Moreover, recognizing that the record shows that the DWR is not in agreement with OWID as to the revisions to be made in the plans for the MR Canal, we deem it advisable to order the OWID to retain within 30 days from the date of issuance of this order a

board of three independent qualified consultants to assess and review the adequacy and soundness of OWID's revised plans for the MR Canal or for the suitable facility to replace such canal. OWID shall nominate one of these consultants; DWR shall nominate one; and the two consultants so selected by OWID and DWR shall together nominate the third. The fees and compensation for these consultants shall be assumed jointly on an equal-division basis by OWID and DWR." (Emphasis added.)

Ultimately, the Board of Consultants recommended a general plan of modification for Miners Ranch Canal whereby the lower reach of the canal would be replaced by a tunnel, and the maintenance road in the upper reach would be modified and maintained as an all-weather road. To implement these recommendations the FPC in an order issued May 22, 1967 ordered as follows (C.R., p. 479):

"The Commission orders:

"(A) The District, licensee of Project No. 2088, shall within a period of six months submit to the Commission revised plans and exhibits to implement the recommendations of the Board of Consultants; shall make at quarterly intervals thereafter periodic reports to the Commission of progress of the work until completion.

"(B) The State of California Department of Water Resources (DWR), licensee of Project No. 2100, is requested to cooperate as much as possible in the situation. Cooperation will inure to the benefit of all parties concerned in maintaining the integrity of both these projects. It should help

Project No. 2088 to meet its primary purpose, namely, to develop irrigation and domestic water supplies for the use of the licensee and for the use of the Yuba County Water District (21 FPC 613, 614 (1959)). Further, it can assure continued maintenance and operation of the projects, consistently with each other."

Upon approval of the plans submitted by OWID pursuant to the above order, the FPC in its order issued January 17, 1974 (two months prior to CPUC's order of March 12, 1974 ordering DWR to be financially responsible for the work ordered by the FPC) added Article 51 to OWID's license for Project 2088. Article 51 provides (C.R., pp. 489-490):

"Article 51. Licensee shall commence construction of the tunnel for the lower reach of the Miners Ranch Canal at the earliest possible date, but not later than September 1, 1974, and shall thereafter in good faith and with due diligence prosecute such construction, and shall complete the tunnel by August 31, 1976." (Emphasis added)

Article 51 is substantially identical in form to Article 48 of OWID's original license for Project 2088. Article 48 designates OWID's responsibility for protecting the downstream face of one of its dams which abuts on and will be inundated by the proposed Oroville Reservoir. Article 48 provides (C.R., p. 445):

"Article 48. At such time as the Oroville dam of Project No. 2100 is constructed, [the District] shall provide for the protection of the downstream face of the Ponderosa dam to a level consistent

with a downstream normal water surface of elevation 900."

DWR believes that Article 51, like Article 48, imposes full responsibility upon OWID to rectify the unauthorized modifications made to Miners Ranch Canal during its construction. The decision of CPUC placing financial responsibility upon DWR for this work conflicts with Article 51.

Because OWID threatened to seek enforcement of CPUC's decision, thereby indirectly requiring DWR to finance the costs of OWID's unauthorized modifications to the Miners Ranch Canal, DWR brought an action for declaratory and injunctive relief in the United States District Court for the Eastern District of California under section 317 of the Federal Power Act, 16 U.S.C. § 825(p), which provides in part:

"The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder."

Jurisdiction was also asserted under 28 U.S.C. § 1337 which provides in part:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."

Declaratory relief was requested pursuant to 28 U.S.C. § 2201 on the basis that there presently exists an actual controversy between DWR and OWID regarding a matter over which the court has jurisdiction.

The District Court found no conflict between the order of the FPC directing OWID to modify the Miners Ranch Canal and the order of CPUC directing DWR to be financially responsible for such modifications, stating (C.R., p. 871):

"At the heart of the matter, however, this court must concur with OWID and the CPUC that there is, in fact, no conflict between the decisions of the FPC and the CPUC. The decision of the FPC requires that the OWID actually construct the tunnel for the Miners Ranch Canal and provides a date for completion. The decision of the CPUC notes that the operation of the DWR project will take or destroy the Miners Ranch Canal aspect of the OWID project and therefore orders DWR to be *financially responsible for a substitute facility.*"

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court stating:

"In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in ---- Fed. Supp. ---- (E.D.Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision."

As the Court of Appeals found no conflict between the administrative orders of the FPC and CPUC, it

was not necessary for it to address the second issue presented in this petition; i.e., the preemption of state law by the Federal Power Act in this situation.

WHY CERTIORARI SHOULD BE GRANTED

The licensing of hydroelectric projects requires, of necessity, an accommodation between projects on the same stream. Such accommodation is accomplished *before* licenses are issued and is reflected in the terms and conditions of the license. The financing, final design, land acquisition and the myriad other factors involved in the construction of a licensed project are all based on the assumption that each licensee will design and construct its respective project in accordance with the terms and conditions of its license.

Such assumption is founded on the express provisions of the Federal Power Act. Section 10(a) of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. § 803(a), provides in part:

“All licenses issued . . . shall be on the following conditions:

“(a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway . . . for the improvement and utilization of water-power development.
. . .”

Section 10(b) of the Federal Power Act, 16 U.S.C. § 803(b), provides in part:

“(b) . . . no substantial alteration or addition not in conformity with the approved plans shall

be made . . . without the prior approval of the Commission. . . .”

It is undisputed that as a result of the Court of Appeals' decision DWR is now responsible for conditions which would not have existed but for OWID's unauthorized modifications to Miners Ranch Canal. It is undisputed that when the licenses for Project 2100 and 2088 were issued it was not anticipated that OWID would unilaterally modify its Project 2088 and bring it into conflict with DWR's Project 2100. It is undisputed that the one conflict which was anticipated when the license was issued for Project 2088 was the partial inundation of Project 2088's Ponderosa Dam. That conflict was resolved by the inclusion of Article 48 in OWID's license.

Article 51 resolves this same type of conflict with respect to Miners Ranch Canal. Article 51 unequivocally places full responsibility upon OWID for the modification of Miners Ranch Canal. Even the prior decision of the Court of Appeals in *Pacific Power & Light Company v. Federal Power Commission*, 333 F.2d 689 (9th Cir. 1964) confirms this conclusion. In that case it was urged that an agreement between the California Department of Fish and Game and the Pacific Power and Light Company required the Department to be financially responsible for the operation and maintenance of a fish hatchery and related facilities constructed by the power company. The court, referring to the agreement and the conditions

in the power company's FPC license, stated (at page 695):

"The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to 'construct, maintain and operate, or * * * arrange for the construction, maintenance and operation of artificial propagation facilities * * * as may be prescribed hereafter by the Commission * * *.'"

It is apparent that the Court of Appeals does not regard the conflict between the Miners Ranch Canal and Oroville Reservoir as a regulatory matter but a condemnation matter, which under ordinary principles turns on state law; i.e., Water Code section 11590. The decision of the United States District Court, which the Court of Appeals adopts, refers to the "taking and destruction" of Miners Ranch Canal by Oroville Reservoir. The District Court states:

"This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the

CPUC was entirely compatible with the duality inherent in the Federal Power Act."

This reasoning, which totally ignores that the causes for the physical conflict were the result of OWID's intentional departure from the terms and conditions of its license, sanctions conduct which is totally inconsistent with the comprehensive regulatory scheme developed by the Federal Power Act. DWR, like any other FPC licensee, is a licensee because the law compels it to be. It has an obligation to plan, design, construct and operate its licensed projects in accordance with the terms of its license, but it also has a corresponding right to demand that others do the same. A federal regulatory system which permits one licensee to unilaterally relieve itself of its obligation, subject its project features to physical damage and then seek refuge under state condemnation law is no regulatory system at all.

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) this court affirmed the exclusive regulatory powers of the FPC in the licensing of hydroelectric projects. The court stated (at p. 167):

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the

division of the common enterprise between two co-operating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§4(e), 10(a), (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission."

Rule 19(1)(b) of the Supreme Court Rules states that one of the grounds which will be considered for certiorari is where a court of appeals "has decided a federal question in a way in conflict with applicable decisions" of this court. The decision of the Court of Appeals substantially erodes the comprehensive regulatory scheme which this court declared to exist in *First Iowa*, and for that reason is totally in conflict with the principles set forth therein. Further, the decision rewards a licensee for the intentional violation of the terms of its license and the Federal Power Act, and for this reason is also in conflict with the principle set forth by lower courts that no licensee should benefit by avoidance of its obligations under the Act and its license. *Central Maine Power Company v. Federal Power Commission*, 345 F.2d 875 (C.A. 1st 1965); *Rumford Falls Power Company v. Federal Power*

Commission, 355 F.2d 683 (C.A. 1st 1966); *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153 (C.A.D.C. 1967).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, acting by and
through the DEPARTMENT OF WATER
RESOURCES,

Plaintiff-Appellant,

vs.

THE OROVILLE-WYANDOTTE IRRIGATION
DISTRICT, an irrigation district,

Defendant-Appellee.

No. 75-3091

OPINION

[June 3, 1976]

Appeal from the United States District Court
for the Eastern District of California

Before: HUFSTEDLER and CHOY, Circuit Judges,
and PREGERSON,* District Judge.

PER CURIAM:

This is an appeal in a controversy between two agencies of the State of California, the Department of Water Resources and The Oroville-Wyandotte Irrigation District. The principal issue is whether Decision 82561 of the California Public Utilities Commission issued March 12, 1974 in Application No. 48869 conflicts with the order of the Federal Power Commission issued January 17, 1974 affecting Projects 2088 and 2100.

* Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation.

— 26 —

In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in ---- Fed. Supp. ---- (E.D.Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision.

AFFIRMED

APPENDIX B

ORIGINAL FILED

AUG 8, 1975

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

By _____ DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

THE STATE OF CALIFORNIA, acting by and
through the DEPARTMENT OF WATER
RESOURCES,

*Plaintiff and
Counterdefendant,*

CIVIL No.
S-74-597

vs.
THE OROVILLE-WYANDOTTE IRRIGATION
DISTRICT, an irrigation district,

*Defendant and
Counterclaimant.*

**MEMORANDUM
HISTORY OF THE CASE**

Plaintiff State of California, acting through the Department of Water Resources [hereafter DWR] initiated this declaratory and injunctive relief action against defendant Oroville-Wyandotte Irrigation District [hereafter OWID]. Both DWR and OWID are agencies of the State of California. California Water Code § 120 and § 11102. Both DWR and OWID are also licensees of the federal government through the Federal Power Commission [hereafter FPC]: DWR is licensed by the FPC pursuant to the Federal Power Act to construct and operate Project 2100 (a dam, reservoir, powerhouse, and related facilities on the

Feather River near Oroville); OWID is licensed by the FPC pursuant to the Federal Power Act to construct and operate Project 2088 (a series of dams, reservoirs, powerhouses and canals on the South Fork of the Feather River near Oroville).

A segment of OWID's Project 2088 is the Miners Ranch Canal, a seven-mile long canal, communication line and maintenance road located above and parallel to a portion of DWR's Project 2100 reservoir in the Feather River's South Fork Canyon. In 1966, a dispute arose between DWR and OWID regarding the design, construction, and operation of the Miners Ranch Canal. OWID contended that the licensed operation of the DWR reservoir would destroy OWID's Miners Ranch Canal. DWR contended that even if OWID were correct, such damage would result from unauthorized modifications of the Miners Ranch Canal by OWID in violation of OWID's obligations under the Federal Power Act and OWID's license with the FPC.

From this basic dispute there followed two separate administrative proceedings—one before the FPC and the other before the California Public Utilities Commission [hereafter CPUC]—both of which resulted in final decisions. The effect of these decisions on the parties is the particular question which confronts this court. To fully understand the state of this case, it will be necessary to review these prior proceedings before the FPC and the CPUC.

(1) Proceedings before the FPC.

The Federal Power Act, Title 16 USC § 791(a) requires that each licensee file with the FPC for approval "as built" drawings reflecting its respec-

tive project as constructed. OWID filed its "as built" drawings of Project 2088 with the FPC on November 7, 1966. DWR filed a protest to this application and petitioned to intervene in the proceedings on March 6, 1967. On May 22, 1967, the FPC ordered that a hearing be held regarding both OWID's Project 2088 and DWR's Project 2100:

"This order directs a hearing involving two projects licensed by this Commission, Project No. 2088 (South Fork Project) and Project No. 2100 (Oroville Project). The matter is occasioned by an application of the licensee for Project No. 2088 for approval of 'as built' project facility drawings. Questions at issue are whether Project No. 2088 as built can be operated and maintained consistent with Project No. 2100 as licensed. If not, what actions should be taken by this Commission at this time regarding Project No. 2088 and Project No. 2100."

A hearing was held and on March 11, 1968, the FPC's Presiding Examiner issued an "Initial Decision." That decision held that OWID had a responsibility to design and construct the Miners Ranch Canal feature of its Project 2088 to operate compatibly with DWR's previously licensed Project 2100.

OWID filed exceptions to this initial Decision and oral arguments were presented to the FPC, en banc, on November 18, 1968. The FPC issued its order January 29, 1969, permitting OWID to file revised plans for Miners Ranch Canal and directing OWID and DWR to establish a three-man Board of Consultants to review the revised plans submitted by

OWID, and any comments thereto submitted by DWR. The FPC order noted:

"At oral argument OWID requested that we hold in abeyance any decision as to the Miners Ranch Canal, and that we order OWID to file revised plans in this connection within 120 days. Without expressing any opinion on the merits of the controversy, we feel it appropriate to grant OWID further time to file revised plans so that we may have before us its position as to the appropriate changes to be made to the project. Moreover, recognizing that the record shows that the DWR is not in agreement with OWID as to the revisions to be made in the plans for the Miners Ranch Canal, we deem it advisable to order the OWID to retain within 30 days from the date of the issuance of this order a board of three independent qualified consultants to assess and review the adequacy and soundness of OWID's revised plans for the Miners Ranch Canal or for the suitable facility to replace such canal. OWID shall nominate one of these consultants; DWR shall nominate one, and the two consultants so selected by OWID and DWR shall together nominate the third."

OWID submitted revised plans, and DWR its comments thereto, and on July 3, 1969, the Board of Consultants issued a report thereon, and a follow-up report on December 12, 1969. On February 18, 1970, the FPC issued its "Order Upon Consideration of Reports by Board of Consultants and the Record Herein." The FPC ordered OWID to submit within

six months, a revised set of plans to implement the recommendations of the Board of Consultants, and requested the DWR to "cooperate as much as possible in the situation."

OWID submitted revised plans to the FPC, DWR reviewed the revised plans and recommended that the Board of Consultants be again convened to review the plans. The FPC, through its Secretary, directed that the Board of Consultants be again convened and on December 7, 1971, the Board of Consultants issued its third report.

Ultimately, OWID submitted a final revised plan which was approved by the FPC in its order of January 17, 1974. That order added Article 51 to the conditions set forth in OWID's license for Project 2088, which article provides:

"Article 51. Licensee [OWID] shall commence construction of the tunnel for the lower reach of the Miners Ranch Canal at the earliest possible date, but not later than September 1, 1974, and shall thereafter in good faith and with due diligence, prosecute such construction, and shall complete the tunnel by August 31, 1976."

The order of the FPC became a final order on February 12, 1974.

(2) Proceedings before the CPUC.

On October 12, 1966, OWID filed Application No. 48869 with the CPUC alleging that the close proximity of Oroville Reservoir to the Miners Ranch Canal created conditions which would ultimately take or destroy the canal. OWID asserted that California Water Code §§ 11590–11592 (West 1973) required DWR to construct a replacement facility for the entire Miners

Ranch Canal. Sections 11590–11592 provide as follows:

“§ 11590. Substitution of facilities; agreement
The department has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the department has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the department and the common carrier, public utility, or state agency.”

“§ 11591. Expenses

The expense of the department in complying with the requirements of this article is part of the cost of constructing the project.”

“§ 11592. Public Utilities Commission; submission of controversies

In the event the department and any common carrier railroad, other public utility, or state agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning requirements imposed by this chapter shall be

submitted to and determined and decided by the Public Utilities Commission of the State.”

DWR responded to OWID’s application by way of a motion to dismiss for lack of jurisdiction asserting that the FPC and the federal courts have exclusive jurisdiction over disputes arising under the liabilities and duties imposed upon FPC licensees by their respective power licenses and by the Federal Power Act. DWR’s motion was denied. A petition for rehearing was filed and it was denied.

A hearing was conducted in September 1967 and at the outset of the hearing, counsel for DWR stated:

“MR. SKJEIE: First of all, I’d like the record to be made plain in one respect and that is that by its participation herein, the State in no way waives its federal law claims for its right to an adjudication thereof in the Federal Courts and before the Federal Power Commission.”

On August 13, 1968, CPUC rendered Decision No. 74542. That decision held that DWR was responsible for replacing the entire Miners Ranch Canal with a substitute facility, a pumping plant:

“1. The substitute facility to be provided by the respondent Department of Water Resources pursuant to Section 11590 for the facilities of the applicant Oroville-Wyandotte Irrigation District to be taken or destroyed by said Department of Water Resources shall be a plant designed to pump water from Oroville Dam into the Miners Ranch Tunnel. The flow of water from applicant’s upstream storage area will be directed into Oroville Dam as soon as the pumping plant is in operation.”

With respect to FPC jurisdiction, the CPUC noted in Decision 74542 as follows:

"It is difficult to conceive how any Commission [CPUC] action could interfere with the jurisdiction of the Federal Power Commission. The latter agency is not concerned with local disputes other than to insure that sponsored projects are efficiently constructed to perform stated functions."

On October 8, 1968, DWR's petition for rehearing of Decision 74542 was denied. On August 10, 1970, OWID petitioned CPUC for a modification of Decision 74542 to change the facilities which DWR was ordered to construct from a pumping plant to a tunnel. Pursuant to OWID's petition, CPUC rendered Decision 79724 on February 15, 1972, which provided:

"IT IS ORDERED that:

"1. Ordering paragraph 1 of Decision No. 74542 is superseded as follows:

The substitute facilities to be provided by the respondent Department of Water Resources pursuant to Section 11590 for the facilities of the applicant, Oroville-Wyandotte Irrigation District, to be taken or destroyed by said Department of Water Resources shall be as follows:

(a) A tunnel approximately 4,400 feet in length extending from the vicinity of the intake tunnel upstream to near the lower siphon, and replacing the lower reach of the canal.

(b) An improved all-weather roadway along the remaining length of the canal.

(c) Slope protection below the remaining length of the canal providing an adequate mantle of coarse material."

DWR petitioned for rehearing and CPUC granted a partial rehearing on the question "whether any inconsistency which may exist between Finding No. 1 of Decision No. 79724 and any FPC Order may be caused by ordering the Department of Water Resources to be *financially responsible for*" the requirements of paragraph 1 of Decision 79724.

On March 12, 1974, CPUC issued Decision 82561 revising paragraph 1 of Decision 79724 by making DWR *financially responsible for* the requirements imposed by that paragraph.

Pursuant to California Public Utilities Code § 1756, DWR petitioned the California Supreme Court for review of the CPUC Decision 82561. The petition for review was untimely filed. On September 12, 1974, the petition was denied without a hearing and without an opinion. A petition for rehearing of the denial was also denied without hearing or opinion on October 10, 1974.

MOTION FOR INTERVENTION

As an initial matter, CPUC has moved this court to intervene pursuant to Federal Rules of Civil Procedure 24(a)(2), intervention as of right, or in the alternative, Rule 24(b), permissive intervention. At a January 3, 1975, hearing on this and other motions, neither DWR nor OWID objected to the intervention of CPUC, and accordingly, this court granted CPUC's motion to intervene.

CONTENTIONS OF THE PARTIES

(1) DWR's Complaint.

Plaintiff DWR filed this action for declaratory and injunctive relief on October 3, 1974, asserting that the orders of the FPC (specifically the January 17, 1974, order adding article 51 to the conditions of OWID's license) and the order of the CPUC (specifically the March 12, 1974, Decision 82561 making DWR financially responsible to provide substitute facilities for Miners Ranch Canal) conflict on both the law and the facts.

In this regard, plaintiff DWR sought two things: (a) declaratory relief as to which order controls the obligations of OWID and DWR; and (b) since OWID has demanded that DWR comply immediately with the order of the CPUC, DWR asks for a preliminary injunction to maintain the status quo pending the final disposition of the declaratory relief action. At the January 3, 1975, hearing in this matter, upon the court's mention that DWR had not formally moved the court for preliminary injunction nor supplied the court with points and authorities, DWR dropped its request for a preliminary injunction, considering it not yet "ripe."

In its complaint, DWR asserts that the action is brought to establish liabilities and duties under the provisions of the Federal Power Act, Title 16 USC §§ 791a-828e. Jurisdiction is asserted under three separate bases:

(a) 16 USC § 825p (a segment of subchapter III of Chapter 12 of the Federal Power Act):

"The District Courts of the United States, and the United States courts of any Territory or other

place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. . . ."

(b) 28 USC § 1337:

"The district courts shall have original jurisdiction of any court action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

(c) 28 USC § 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(2) OWID's Motions.

OWID has moved this court to dismiss the action on several grounds, or in the alternative, for summary judgment. The motion to dismiss challenges the sufficiency of the complaint on the following grounds: (a) lack of subject matter jurisdiction; (b) lack of justiciability; (c) *res judicata* effect of the decisions

of the CPUC and the California Supreme Court; (d) *res judicata* effect of a decision by the Ninth Circuit in *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir 1969); (e) there is no conflict between the decisions of the FPC and the CPUC.

OWID, in its answer, raised a counterclaim against DWR under state law for the enforcement of the CPUC order. The motion for summary judgment seeks only judgment on this counterclaim as a matter of law. Obviously, the validity of the counterclaim and OWID's motion for summary judgment is irrevocably tied to the declaratory relief action raised by DWR in the first instance.

(3) Motions by CPUC.

CPUC, the intervenor, has moved to dismiss or in the alternative, for summary judgment in its favor and against DWR on the following bases: (a) lack of jurisdiction over the subject matter on the basis of the *res judicata* effect of the CPUC and California Supreme Court decisions herein; (b) there is no conflict between the decisions of the FPC and the CPUC.

(4) DWR's Motion for Summary Judgment.

DWR has made a cross motion for summary judgment and raises the following contentions: (a) there is a conflict between the decisions of the FPC and the CPUC in this case; (b) the Federal Power act preempts operation of California Water Code §§ 11590-11592; (c) the decision by the California Supreme Court is not *res judicata* because not on the merits as the petition for review was untimely filed.

DECISION

It is possible to cut through the convoluted history of this case and the maze of motions herein and dispose of it by deciding the central issue.

As an initial matter, this court agrees with DWR that jurisdiction is proper here pursuant to 16 USC § 825p. While the courts of appeal have authority pursuant to 16 USC § 8251 to review on appeal orders of the FPC, the district courts are empowered pursuant to 16 USC § 825p to enforce violations of orders of the FPC or suits in equity to enforce any liability or duty created by an order of the FPC. This jurisdictional base can be read in conjunction with the Declaratory Relief Act, 28 USC § 2201, which affords power to district courts in actual cases and controversies to declare rights and liabilities between parties. In the instant case, there is a conflict between DWR and OWID in the way these agencies interpret the effect of the decisions by the FPC and the CPUC.

At the heart of the matter, however, this court must concur with OWID and the CPUC that there is, in fact, no conflict between the decisions of the FPC and the CPUC. The decision of the FPC requires that the OWID actually construct the tunnel for the Miners Ranch Canal and provides a date for completion. The decision of the CPUC notes that the operation of the DWR project will take or destroy the Miners Ranch Canal aspect of the OWID project and therefore orders the DWR to be *financially* responsible for a substitute facility.

The national importance and scope of federal power projects prevents the states from exercising a veto power over such projects as have been designated

by appropriate federal agencies. *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 66 S.Ct. 906 (1946). Nevertheless, the courts have long recognized that while the Federal Power Act confers broad federal control on power projects, the states continue to exercise compatible powers. As the Supreme Court noted in *First Iowa, supra*:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The quality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction." 328 U.S. at 167-168.

In 1969 when a decision of this court in the instant case had first been appealed to the Ninth Circuit Court of Appeals, that court recognized that the State of California through the CPUC's application of California Water Code §§ 11590-11592, had a role to play which was compatible with federal authority under the Federal Power Act. *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir 1969). In its opinion the Ninth Circuit said:

"[DWR] urges that [First Iowa, *supra*] applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed

the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. It is merely charged with the duty of determining liability for damage done by one California agency to the property of another." [emphasis added] 409 F.2d at 536.

This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act.

There is no doubt as to the applicability of the summary judgment procedure to a proceeding for declaratory relief. See 6 Moore's Federal Practice § 56.17 at p. 2541 (1974). Accordingly, the motions of OWID and CPUC for summary judgment are GRANTED and the motion of DWR for summary judgment is DENIED. Declaratory judgment is entered in accordance with the views expressed in this memorandum.

IT IS SO ORDERED.

DATED: August 8, 1975.

THOMAS J. MacBRIDE
United States District Judge

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